**2010-5028**

# United States Court of Appeals

*for the*

# Federal Circuit

WALTER ROSALES AND KAREN TOGGERY,

*Plaintiffs-Appellants,*

*vs.*

UNITED STATES,

*Defendant-Appellee.*

*Appeal from the United States Court of Federal Claims in Case No. 08-CV-512, Judge Lawrence J. Block.*

## REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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Form 9

FORM 9. Certificate of Interest

# UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Walter Rosales et al. v. United States

No. 2010-5028

## CERTIFICATE OF INTEREST

Counsel for the (petitioner) (appellant) (respondent) (appellee) (amicus) (name of party) Walter Rosales & Karen Toggery certifies the following (use "None" if applicable; use extra sheets if necessary):



1. The full name of every party or amicus represented by me is:

Walter Rosales and Karen Toggery

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

None

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

None

4. ☐ The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

None other than myself at this time

12-13-09
Date

Signature of counsel

PATRICK D. WEBB
Printed name of counsel

Please Note: All questions must be answered

cc:

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## SUMMARY OF REPLY

The government falsely denies what is undisputed in the record, hoping once again to have this Court, like all the preceding courts, improperly avoid deciding the merits of Appellants' beneficial ownership of parcel 04. The government makes these misrepresentations without any supporting evidence. The government also ignores and misrepresents the law for which it has no answer, particularly *Carcieri v. Salazar*, 129 S. Ct. 1058 (2009).

The government begins by falsely claiming:

(1) that parcel 04 was not taken in trust for individual "Jamul Indians of one-half or more Indian blood," Answering Brief, "AB"14, when it was, A425;

(2) that "the Secretary did not rely upon" 25 U.S.C. 465 and 479 in accepting parcel 04 in trust for individual Indians, AB36, when he did, A425; and

(3) that *Carcieri* is irrelevant because the organization of "persons of one-half or more Indian blood," as a tribe was supposedly not mentioned, AB36, AB47, when that "discrete definition" of "tribe" was explicitly included. 129 S.Ct. at 1068, 1070, 1074-75.

In fact, *Carcieri* holds that the government cannot take land into trust for any tribe, that was not under federal jurisdiction in 1934, however organized under IRA§16, or defined under IRA§19, but could take land into trust for individual

"persons of one-half or more Indian blood," as found in *Coast Indian Comm.*, 550 F.2d at 651, n32, *U.S. v. State Tax Comm*., 535 F.2d at 304; *Assiniboine Tribe*, 428 F.2d at 1329-30, and *Mem. Sol. Int.* at 668, 724, 747, 1479, A454-63. *Carcieri* at 1061, 1064-68, 1070 and 1074-75. Here, *Carcieri* couldn't be any more relevant.

The Appellants' tribe never acquired jurisdiction or ownership of parcel 04. In fact, the government designated resident individual Indians, including the Appellants, as the beneficial owners of parcel 04, as a matter of law. *Id*.; A382-92. This designation is uncontroverted, since Appellants received services usually accorded to beneficial owners of trust property, including housing and interment of their dead on parcel 04, for 28 years. *Id*.; A382-5. Nor could parcel 04 have been acquired for a tribe that undisputedly did not then exist, A425, A452, leaving only the possibility that the Appellants are beneficial owners of parcel 04. *Id*.; A384.

The record has no evidence that the tribe's constitution asserts "jurisdiction and ownership" over parcel 04. A387 and A442. The government concedes that as of May 4, 2000, there is "no record of the 1978 trust parcel being known as the Jamul Indian Village," A429, and no amended deed was ever recorded. A392-98. Contrary to AB34-35, the Solicitor does say, and *State Tax Comm.*, at 304, holds, that certain words "necessarily" must be used in a deed to transfer the individual Indians' interest in parcel 04 to a subsequently recognized tribe, *Mem. Sol. Int.*

668, 724, 747, 1479, A454-463, and those words are not on the parcel 04 deed. A425.

The Appellants' claims were filed on November 12, 1998, well within six years of the government's first breach of Appellant's beneficial ownership of parcel 04, when certain mobile homes on parcel 04 were destroyed between 1992-98. A492, A497, A500-1, A504, A506, A507, A508.

The record has no evidence that the tribe or the government claimed that the tribe had beneficial ownership of parcel 04, until February 5, 2001. A144. Hence, the CFC correctly allowed the Appellants to file a Rule 15(d) supplemental amended complaint in both actions, A24, setting out the government's subsequent repudiation of Appellants' beneficial ownership on February 5, 2001.[1] Since the government's repudiation arises out of the conduct, transactions and occurrences that began during 1992-98, when the government first failed to prevent the alienation of Appellants' beneficial ownership of parcel 04, Appellants' claims relate back to the filing of the 1998 complaint.

Contrary to the government's claim, no prior Court has decided the merits of who is the beneficial owner of parcel 04. *Rosales VII* and *IX* both dismissed

[1] Where AOB 34 mistakenly refers to November 5, 2001, it should have stated February 5, 2001.

Appellants' beneficial ownership claims for lack of jurisdiction, under RCFC 12(b)(7) and 19, without adjudicating the merits of who is the beneficial owner of parcel 04. The government concedes that there can be no issue preclusion, where the merits of beneficial ownership were not adjudicated.[2]

The intervening *Carcieri* decision now holds that a tribe cannot subsequently acquire trust property, when it was not under federal jurisdiction in 1934. Since *Rosales VII* and *IX* were dismissed for lack of jurisdiction over what the Supreme Court now holds is a frivolous claim of beneficial ownership, the merits of ownership were not decided, and the dismissals were superceded by the intervening decision in *Carcieri*. Hence, Appellants are finally entitled to a decision on the merits of their beneficial ownership of parcel 04.

Since the Appellants' tribe was not under federal jurisdiction in 1934, and since it never acquired any interest in trust parcel 04, it does not have a non-frivolous claim in this action, and is neither a required or necessary party, and certainly is not an indispensable party, to Appellants' claims for breach of fiduciary duty and taking against the government. Therefore, the CFC's dismissal of Appellants' claims must be reversed, and the case remanded for trial.

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[2] That is not to say that there was no *dicta* in *Rosales VII* and *IX*, concerning the beneficial owners of parcel 04; rather, that such *dicta* is neither controlling, nor an adjudication of the merits of ownership. AOB 32,fn. 9, 50, fn. 14, 52, fn.16.

## 1. Appellants' Claims Were Filed Within the Tucker Acts' Six Year Limitation Period, 28 U.S.C. 2501

Appellants allege the government's continuing breach of their beneficial ownership of parcel 04, since November 12, 1992. A493. The government ignores the undisputed fact that the original complaint was filed on November 12, 1998, by individual plaintiffs, including Walter Rosales. A490.[3]

Having filed the action on November 12, 1998, for acts after November 12, 1992, Appellants' claims are timely within the Tucker Acts' six year limitation period. Both sides agree, Appellants' claims accrued when the government first breached the Appellants' beneficial ownership of parcel 04, after November 12, 1992. *Jones v. United States*, 9 Cl. Ct. 292, 295 (Cl. Ct. 1985), *aff'd* 801 F.2d 1334, 1335-36 (Fed. Cir. 1986).

The record has no evidence of any breach of the Appellants' beneficial ownership of parcel 04, before November 12,1992. Contrary to AB 20, there is no deed taking parcel 04 into trust for any tribe, nor any evidence that the tribe asserted "jurisdiction or ownership" over parcel 04, before November 12, 1992.

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[3] Appellants have not "shifted" arguments. AB 29. The government just ignores the individual claims that have been in the original complaint since 1998, A490. While it also stated causes of action on behalf of the Appellants' tribe, all of these tribal claims have been dismissed, without appeal.

Hence, Appellants' claims are well within the Tucker Acts' six year statute of limitations.

Appellants allege: "defendants, and each of them... illegally violated the plaintiffs' usufructuary[4] property rights...under the U.S. Constitution," A492, and "[s]ince November 12, 1992, the Federal defendants have been continuously violating Title 25 of the U.S.C., including the Indian Reorganization Act of 1934, 25 U.S.C. 461 et seq.," A493, A500-1, by "violat[ing] the plaintiffs' usufructuary property rights," in parcel 04, A492, "depriving the plaintiffs...of due process...in violation of...the Fifth Amendment of the U.S. Constitution," A504, "interfering with the plaintiffs' rights under the federal government's general trust responsibility for the management of Indian affairs and the plaintiffs' rights to participate in federal Indian benefits[5]...in violation of the Indian Reorganization

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[4] "The right of enjoying a thing, the property of which is vested in another, and to draw from the same all the profit, utility, and advantage which it may produce, provided it be without altering the substance of the thing." *Black's Law Dictionary* (1968) p. 1712. The Indian's beneficial ownership of trust property is usufructuary, including all rights to possess and use the land, except the right to transfer the fee simple title, which is exclusively the government's. AOB38. It is the right to exclude all others, save the United States, which remains obligated to protect the individual Indian from any alienation of the property by the tribe or any other third party. *Alcea Band of Tillamooks,* 329 U.S. at 46; *Tlingit et al. v. United States*, 389 F.2d 778, 782 (Ct. Cl. 1968); *United States (Tabbytite) v. Clarke*, 529 F.2d 984, 986 (9th Cir. 1976).

[5] "Federal Indian benefits" include beneficial ownership of real property by individual Indians. 25 U.S.C. 465; *Carcieri* at 1074-75; A395.

Act," A504, "interfering with the plaintiffs' rights to participate in federal Indian benefits...interfering with plaintiffs' usufructuary rights to use, occupy, and quietly enjoy federal... real property...and otherwise denying plaintiffs their right to due process...of...the Constitution of the U.S.," A506, A508, "[t]hese acts by the defendants have caused the plaintiffs severe property damage," A507, "denied plaintiffs their usufructuary property..rights," and "greatly and irreparably damaged [Plaintiffs] by reason of Defendants' infringement and violation of their usufructuary property...rights," A508, when certain mobile homes were destroyed between 1992 and 1998. A492-3, A497, A500-1, A504, A506, A507, A508.

The government falsely denies and misrepresents what is undisputed in the record. According to the government, Appellants' claims accrued, "no later than July 7, 1981, when Interior approved the Tribe's constitution asserting jurisdiction and ownership over Parcel 04." AB20. However, there is no evidence that the tribe asserted jurisdiction or ownership over parcel 04, before November 12, 1992. The tribe's 1981 constitution makes no reference to parcel 04 or anything by which any property can be identified. A442. Instead, the constitution only states that its jurisdiction, "shall extend to all lands now within the confines of the Jamul Indian Village," which is not further defined. A442; A392-98.

The government still concedes that as of May 4, 2000, "there is no record of the 1978 [4.66 acre[6]] trust parcel being known as the Jamul Indian Village," and that "[t]here was also a small parcel accepted into trust in 1982 by the SCA Supt. for the Jamul Indian Village (1.37 acre)." The government's claim that "parcel 04 was 'within the confines of the Jamul Indian Village,'" AB21, is just not true, and contravened by the government's own documents, which prove otherwise. A429.

The recorded deeds and the tribe's constitution establish as a matter of law, that the tribe could only have acquired "jurisdiction and ownership" over the 1.37 acres deeded by the Catholic Diocese in parcel 05, and not the 4.66 acres in parcel 04, had it been under Federal jurisdiction in 1934. The tribe never acquired beneficial title or control over parcel 04. Compare, A425-6 and A431.

Moreover, the tribe was not required to have "jurisdiction and ownership" of any property, before it could become a reorganized tribe under the IRA. Contrary to the government, no such requirement exists, and many tribes are recognized to be landless.[7] Even if there were such an imaginary requirement, the July 27, 1982

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[6] It is undisputed that the 4.66 acre parcel is parcel 04. A425, A429.

[7]See for e.g., *Citizens Exposing Truth about Casinos v. Kempthorne*, 492 F.3d 460, 464 (D.C.Cir.2007); *Patchak v. Salazar*, 646 F.Supp.2d 72 (D.D.C.2009); *United Keetoowah Band of Cherokee Indians of Oklahoma v. U.S. Dept. of Housing*, 567 F.3d 1235 (10th Cir. 2009); *Wisconsin v. Stockbridge-Munsee Community*, 366 F.Supp.2d 698 (E.D.Wis. 2004); *Mechoopda Indian Tribe of Chico Rancheria, Cal. v. Schwarzenegger*, 2004 WL 1103021, *10 (E.D. Cal. 2004); *Artichoke Joe's California Grand Casino v. Norton*, 278 F.Supp.2d

recording of the deed for parcel 05, A431, purports to grant the tribe jurisdiction and beneficial ownership of parcel 05, which was "now within the confines of the Jamul Indian Village," by the time the tribe was federally recognized and listed in the Federal Register on November 24, 1982.

The government also continues to falsely claim that listing the tribe as "recognized," somehow asserts jurisdiction and ownership of parcel 04. AB 21. However, the listing in the Federal Register does not mention the tribe's jurisdiction, or ownership of parcel 04. It merely lists the tribe, as recognized, on November 24, 1982, after it had acquired parcel 05, on July 27, 1982. Compare 47 Fed. Reg. 53,130, 53,132 (Nov. 24, 1982) with A431.

Without evidence, the government just fabricates facts it cannot prove, claiming that "Interior deemed the Parcel to constitute the Village's reservation," and Appellants "attempted to assert control over this property," AB22, and "[t]his land became the Jamul Indian Village reservation," AB31, as if this land were parcel 04, when it was actually parcel 05, A431, as alleged in *Rosales I-IV and VIII*. There is no evidence to support these false statements, all are directly

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1174, 1096-97 (E.D. Cal. 2003); and IGRA 25 USC 2719, recognizing landless tribes.

contradicted by the government's own historical records, A429, and there is no citation to any authority for the misrepresentation.

Wishing it so, doesn't make it so. Nor does repeating the non-binding Ninth Circuit dismissal for lack of jurisdiction, AB 27, A53, without deciding the merits of any purported claim "since 1981." The government concedes *Rosales VII* and *IX* are not on the merits. They have also been superceded by *Carcieri*. No court with jurisdiction has decided the beneficial ownership of parcel 04. Neither the constitution, nor the Federal Register, identify parcel 04 within the tribe's jurisdiction. The only evidence of any non-frivolous tribal claim since 1981, was over parcel 05. AOB 41-42; A431-32.

The record evidences that individual Indians organizing as a tribe, must only acquire beneficial ownership and reside upon some reserved land. A392-98; A466-67; *Mem. Sol. Int*. at 668, "these Indians may be organized under [the IRA] after land has been acquired for them." *Mem. Sol. Int.* at 724, 747, and 1479, A629-38; *Handbook,* §3.02, 135 (DOI 2005). A392-98.

A "reservation" of Indian land may be acquired for individual Indians, particularly where their tribes are, or have become, landless. *United States v. McGowan*, 302 U.S. 535, 537 (1938), found land purchased for several hundred individual Indians in the Reno Indian Colony was a reservation; *United States v.*

*John*, 437 U.S. 634, 649 (1978), found land purchased for the individual Mississippi Choctaw Indians was a reservation; *see also, Oklahoma Tax Comm. v. Citizen Band of Potowatomi*, 498 U.S. 505, 507 (1991).

"Reservation means:...(3) Land acquired by the United States to reorganize adult Indians pursuant to statute," 25 C.F.R. 292.2, and 25 U.S.C. 1903(10), defines reservation as land held by the U.S. in trust for the benefit of any Indian individual. The IRA does not require that a recognized tribe exercise jurisdiction over any land, only that individual Indians organizing as a tribe live on reserved land. 25 U.S.C. 465, 479. In fact, "[p]ersons of one-half or more Indian blood...but not residing on a reservation cannot organize under the IRA." *Handbook*, §3.02[6][d], p.135 (DOI 2005).

"Unless and until a tribe was formally recognized by the Federal Government [before 1934] and therefore eligible for trust land, the Secretary would take land into trust for individual Indians who met the blood quantum threshold." *Carcieri* at 1075. There simply is no requirement that any subsequently recognized tribe have "jurisdiction and ownership" of any such land acquired for the individual Indians.

The government concedes that where no tribe yet exists, as here in 1978, the Secretary can take land into trust for individual "persons of one-half or more

Indian blood",“unaffiliated with a tribe," residing on the same piece of reserved land, and the individual Indians can then transfer the land to a subsequently recognized tribe. AB31-33. However, “in that case where the deed has already been recorded and accepted, it will be necessary to secure a new deed," to transfer the individual Indians' interest to the subsequently recognized tribe, as with the Mississippi Choctaw and St. Croix Chippewa. A453, A458, *Carcieri* 1074-75.

There simply is no evidence or authority that acquiring land for individual Indians, who later organize as a tribe, automatically transfers their individually owned land to the tribe. It still takes a recorded deed to transfer the property to the tribe, which was never done here. A397-98. See, for e.g., “the Quartz Valley Indians, Duckwater Shoshone Indians, Yomba Shoshone Indians, Port Gamble Band of Clallam Indians, and Sokaogan Chippewa Indians," *Handbook* § 3.02, 146 (n99) fn 105, and “the Mole Lake Chippewa Indians of Wisconsin, the Shoshone Indians of Nevada, the St. Croix Chippewa Indians of Wisconsin, and the Nahma and Beaver Island Indians." *Carcieri* at 1070, 1074-75.

In fact, the government's July 1, 1993 memo specifically states that: “[t]he Commissioner further held that should these Jamul half-bloods secure, in trust status, the tract of land on which they reside they would be eligible to organize as a community of adult Indians of one-half degree or more Indian blood under Section

16 of the IRA." A466. This BIA memo further confirms that the individual "Jamul half-bloods" were granted parcel 04 "in trust for such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate," and that parcel 05 was granted by the Catholic Bishop "in trust for the Jamul Indian Village 1.372 acres." A467. The government still concedes that there is no document referring to parcel 04 as being under the "jurisdiction or ownership" of the subsequently recognized tribe. A429.

Moreover, the government admits that before any deed could be recorded transferring the individuals' interests to a tribe, the individual Indians must consent to such transfer, as they did in *Coast*, 578 F.2d 1391. *Handbook*, Ch. 11, B3, pp. 615-16 (DOI 1982), and §16.03, p. 883 (DOI 2005),[8] and that never happened here; Nor did any subsequent deed transfer the individual Indian beneficiaries' interest in the parcel to any tribe. A393-97.

The government cannot truthfully deny that it failed to follow its own guidelines, which it has declared, A454, A458, *Carcieri* 1074-75, and *State Tax Comm.* at 304, holds, were "necessary" to effect a transfer of the individual

[8]The United States remains bound by the admissions in Congress' delegated revision of the *Handbook*, under contract to the Univ. of New Mexico. 25 U.S.C. 1341(a)(2).

Indians' interests to a tribe, even if the Appellants had consented to such a transfer to the subsequently recognized tribe.

Since no subsequent deed was recorded, A392-98, the Appellants' beneficial ownership was not transferred to any tribe, as a matter of law. A394-98; *Mem. Sol. Int*. at 668, 724, 747, and 1479, A454-463; *Carcieri* at 1070 and 1074-75, citing *Mem. Sol. Int*. at 706-707, 724-725, 747-748; *Handbook*, §3.02, p. 135, 146 (n99) fn 105 (DOI 2005); *Handbook,* Ch.1, Sec. B2e, at 15-16, fn 86 (DOI 1982).

Since the 1978 deed fails to contain the final phrase, "until such time as they organize," as with the Choctaw, A454; and fails to state: "until such time as they organize under section 16 of the [IRA] and then for the benefit of such organization," as with the Chippewa, A458; and fails to state: "and then in trust for such organized tribe," A454, the property remains in trust for the individual Indians, who have never consented to transfer their beneficial ownership to any tribe. A394-98.

Since the 1978 deed did not follow the government's guidelines for transfer to the subsequently organized tribe, parcel 04 remained in trust for the individual Appellants, and was never in trust for the tribe, just as in *Coast Indian Comm*. at 651, and *State Tax Comm.*, at 304, where the absence of the words "then in trust for such organized tribe" in a relief act designating individual Choctaw

beneficiaries was held to mean that "only those individuals designated by the Interior Secretary were to have the benefit of this" designation, since "[n]either a tribe nor a reservation is mentioned." *Id.*

The government continues to misrepresent the facts of *Coast*, and fails to distinguish the 30 history of precedent cited at AOB55. Contrary to AB35, the individual members of the *Coast* community sued the government, just as the Appellants, who are individual members of the Jamul Indian Village, A377, A626, sued the government here. In fact, "[t]he Rancheria was not acquired for a tribe, leaving only the possibility under the Act that it was purchased for **individual** Indians. The deed and proclamation say nothing to contradict this. Thus, the land was taken in trust for the **individual** Coast Indian Community members." 550 F.2d at 651 (emphasis added).

Moreover, these individual Indians were awarded the full market value of their personal interests, and a formal transfer of their individual interests was required to convey their awards to the Coast Indian Community, "as an entity." 578 F.2d 1391 (Ct. Cl. 1978). Therefore, just as in *Coast*, Appellants are beneficial owners of parcel 04, as a matter of law.

Nor can the government truthfully deny that is what happened here. The tribe did not exist in 1978, A396, when the Appellants' were granted individual

beneficial ownership of parcel 04, so they could organize under the IRA. A466-67. The tribe's constitution was then adopted, and the Catholic Church granted the tribe beneficial interest in parcel 05 on July 27, 1982. A431. This is the only parcel the government has record of, ever being known as "the Jamul Indian Village." A429. The tribe was then recognized on November 24, 1982, A386, with jurisdiction and ownership of parcel 05.

No grant deed ever transferred the individual Indians' designated beneficial ownership of parcel 04 to any tribe. A392, A396. Nor could the parcel be deeded to a subsequently created tribe, that was not under federal jurisdiction in 1934. *Carcieri*, 1061-70. The parcel 04 deed was never altered or re-recorded, A392-97, and fails to contain the final phrase, "until such time as they organize under section 16 of the [IRA] and then for the benefit of such organization."

Therefore, parcel 04 remains in trust for the individual Appellants, who have never consented to transfer their beneficial ownership to any lawfully recognized tribe, A395, A454, A458; *Coast*, 651; *State Tax Comm.*, 304; *Carcieri*, 1061-70, and whose interest was first breached within the Tucker Acts' six year limitation period, thereby requiring the CFC dismissal be reversed.

### 2. The November 12, 1998 Action Tolled the Limitations Period, and the CFC Correctly Applied the Relation Back Doctrine to the Continuing Claims in Both Amended Complaints

There is no evidence that the government breached Appellants' beneficial interest in parcel 04 more than 6 years before November 12, 1998. Moreover, since this action was already pending, Appellants were permitted to supplement their claims with the government's first act totally repudiating Appellants' beneficial ownership of parcel 04, on February 5, 2001. A53, A144; *Charles v. Shinseki*, 587 F.3d 1318, 1323 (Fed. Cir. 2009), *Barron Bancshares, Inc. v. United States*, 366 F.3d 1360, 1369-70 (Fed. Cir. 2004), and cases not denied by the government, cited in AOB at 46-49, finding the original action tolls the limitations period for supplemental claims that arise after the original action was filed and stayed, and particularly while the regulatory appeals take more than six years, as here.

Contrary to the government's misrepresentation, AB 22-23, Appellants have never claimed to be ignorant of when their claims accrued, or that the government concealed its breach, or that the accrual of their claims was inherently unknowable. The Appellants knew their original claims accrued when the government first breached its fiduciary duty to protect their individual usufructuary beneficial interest in parcel 04, after November 12, 1992, when certain mobile homes were destroyed, which is why they filed the original action on November 12, 1998. A492-3, A497, A500-1, A504, A506, A507, A508.

Subsequently, Appellants learned on February 5, 2001, that the government and the tribe were, for the first time, claiming that the tribe had a beneficial interest in parcel 04. This is the first time the government totally repudiated the Appellants' individual beneficial interest in trust parcel 04, even though the government had begun breaching its fiduciary duty to the Appellants after November 12, 1992, when it failed to prevent the destruction of the mobile homes on the property.[9] Contrary to AB26, both the government and the Appellants put the government's notice of repudiation before the CFC. A53, A144.[10]

The CFC properly granted leave to amend, after the stay was lifted, September 26, 2008, A29.8, to add these supplemental facts, which occurred while the original action was still pending. A24; 28 U.S.C. 1367; *Charles v. Shinseki*, 587 F.3d 1318, 1323 (Fed. Cir. 2009). Hence, the Appellants have had continuing

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[9] Contrary to AB40, Appellants never alleged the repudiation "more than three years before it occurred," thereby making *Hopi Tribe v. United States*, 20 Cal. Ct. 782, (1990) inapposite for the government's erroneous argument; however, *Hopi Tribe* does hold that "if [as here] the claims were ripe when they were originally filed in 1984, then plaintiff should have the benefit of the 1984 filing date," *Id*., at 786, since "a dismissal without prejudice carries no preclusive effect under *res judicata* or collateral estoppel principles." See, Part 3, at 21.

[10] The government is wrong to falsely claim this issue was not raised before the trial court, AB 26, since Appellants and the government both put this notice before the CFC. A53, A144. Moreover, Appellants have never claimed that "they could not have known" of the tribe's claims "since 1981," because those claims were over parcel 05, not parcel 04. AOB 41-42; A431-32, and *infra* at 8-10.

individual claims since November 12, 1992, which were supplemented, with the government's first repudiation of Appellants' beneficial ownership in parcel 04, on February 5, 2001. A53, A144.

Contrary to AB24, there is no "single distinct event," as opposed to a series of events, that caused "ill effects that continue to accumulate over time," particularly since the government's acceptance of the tribal constitution did not breach Appellants' beneficial interest in parcel 04. Rather, the government's first breach of Appellants' beneficial ownership of parcel 04, occurred when certain mobile homes were destroyed after November 12, 1992. That breach continues, now that the government totally repudiated Appellants' beneficial ownership of parcel 04, on February 5, 2001.

The Appellants' individual claims are based upon the government's breach, not the tribe's acts. But for the government's continuing failure to prevent the alienation, of Appellants' beneficial ownership of parcel 04, since November 12, 1992, and the ultimate destruction of their homes and desecration of their families' remains, and the government's continuing failure to return them to the property, Appellants would not have been damaged by any of the unauthorized acts by the tribe.

The government cannot deny that such failure constitutes a breach of the government's highest fiduciary duty to individual Indians. *Jones v. United States*, 9

Cl. Ct. 292, 295, *aff'd* 801 F.2d 1334 (Fed. Cir. 1986); *Coast* at 652-54. "Plaintiffs' claim for breach of trust consists of the government's failure to (1) enforce the 1918 decree...(2)block Hattie Davis Rogers' eviction; (3) prevent the tax sale, and (4) seek return of the property once it was sold.. The...-failure to have the property returned-was a continuing breach of trust..." *Jones* at 295.

The government, as trustee, has a "fiduciary duty" to exercise reasonable care "against deterioration caused by use, by the elements, by catastrophe or otherwise...," and to prevent "the destruction, alteration, misuse or neglect of the property," and "to preserve," "maintain and repair," "the trust property intact." *White Mountain Apache Tribe v. United States*, 249 F.3d 1364, 1378-80 (Fed. Cir. 2001).

"The United States, when acting as trustee for the property of its Indian wards, is held to the most exacting fiduciary standards..."" The United States failed to act here in a manner that met the high fiduciary standards imposed upon it when it deals with Indian property as a trustee. It must therefore respond in damages for breach of its trust obligations..." *Coast* at 652-54.[11]

[11] Contrary to AB25 and AB56-57, the Appellants set forth both in the complaint, A380 and the AOB1-3, the "specific rights-creating or duty-imposing statutory or regulatory prescriptions," *United States v. Navajo Nation,* 129 S. Ct. 1547, 1555 (2009).

"The claim will not be barred provided that at least one wrongful act occurred during the statute of limitations period." *Felter v. Norton*, 412 F.Supp.2d 118, 125 (D.D.C. 2006). "Since the [damage began to take] place within six years of the filing of this suit, the claim is not time-barred." *Mitchell v. United States*, 18 Cl. Ct. 474, 484 (Cl. Ct. 1987).

Since the government did not begin to breach its fiduciary duty to prevent the alienation of the Appellants' beneficial ownership of parcel 04, until after November 12, 1992, the Appellants' claims, filed on November 12, 1998, are within the six year limitations period, and the CFC's dismissal should be reversed.

The government concedes that supplemental claims will relate back to the original action, where they arise out of the same conduct, transactions, and occurrences originally alleged. AB38. Here there is no departure from the primary claims, merely supplemental acts by the government further breaching Appellants' beneficial ownership of parcel 04, as originally alleged in 1998.

The government falsely denies notice of the Appellants' individual claims, even though they have been in the original complaint since 1998. A490-508. Contrary to AB39, Appellants have never claimed that they "did not bring any claims with respect to parcel 04" in the original action, only that the majority of the then unresolved tribal claims arose on parcel 05, A1151-52, and at the time the government agreed. AB39.

Hence, the CFC correctly assumed that the Appellants' amended claims relate back to the 1998 claims, when the government first breached Appellants' beneficial ownership of parcel 04, when the mobile homes were destroyed between 1992 and 1998. Therefore, Appellants' claims were timely filed within the Tucker Acts' six year limitation period, and the CFC dismissal must be reversed.

**3. The CFC Erroneously Applied the Issue Preclusion Doctrine**

The government concedes that for issue preclusion to apply, the issue must actually have been litigated to a judgment on the merits in the first action. AB 42, citing *Innovad Inc. v. Microsoft Corp*., 260 F3d 1326, 1334 (Fed. Cir. 2001). "[A]n adjudication on the merits is one of the prerequisites for collateral estoppel" or issue preclusion. *Hukic v. Aurora Loan Services*, 588 F.3d 420, 431 (7th Cir. 2009). "Dismissals for want of jurisdiction are paradigms of non-merits adjudication." *Nilsen v. City of Moss Point, Miss.*, 701 F.2d 556, 562 (5th Cir. 1983). "[A] dismissal without prejudice carries no preclusive effect under *res judicata* or collateral estoppel principles." *Hopi Tribe v. United States*, 20 Cl. Ct. 782, 785 (Cl. Ct. 1990).

Neither *Rosales VII* or *IX* were decided on the merits, since the dismissals for lack of jurisdiction were, as a matter of law, without prejudice. *Univ. of Pittsburgh v. Varian Medical Systems, Inc.*, 569 F.3d 1328, 1332 (Fed. Cir. 2009), citing *Hughes v. United States*, 71 U.S. (4 Wall.) 232, 237 (1866), and 18A Charles

A. Wright, *Federal Practice and Procedure* § 4438 (2d ed. 1987); *Costello v. United States*, 365 U.S. 265, 286-87 (1961).

The government, like the CFC, ignores the fact that the So. Dist. of Cal. refused to find issue preclusion in *Rosales IX*, since the parties had not had a full opportunity to litigate the issues on the merits because the dismissal was without prejudice in *Rosales VII*, and the fact that the issues were not identical [trust patent claims versus personal injury claims]. 2007 WL4233060, *4.

Thus, the Appellants are free to continue to assert their claims for beneficial ownership of parcel 04 here, because those issues have never been decided on the merits, and because the Supreme Court has superceded the non-binding prior lower court decisions, which dismissed those claims for procedural, and not substantive reasons, that are no longer the law of the land.

Hence, the government cannot rely upon *Rosales VII* or *IX* for issue preclusion, contrary to AB30 and AB41. Nor can the government rely upon phantom documents, it admits are "not yet in the record," AB 30, in an improper attempt to validate these non-binding, erroneous, and superceded opinions, since a tribe that was not under federal jurisdiction in 1934, never became a beneficial owner of parcel 04.

Federal Rule of Civil Procedure 12(b)(7) allows dismissal of an action for failure to join a party under Rule 19. *Univ. of Pittsburgh*, at 1332. However it is

clear that a dismissal for failure to join a party is not an adjudication of any issue on the merits, and thus does not have issue preclusive effect, since such a dismissal is without prejudice. *Hughes* at 237, "If the first suit was dismissed for defect of pleadings, or parties, ... the judgment rendered will prove no bar to another suit." "The judgment [for failure to join necessary parties] is in no just sense a judgment upon the merits." *Gilman v. Rivers*, 35 U.S. (10 Pet.) 298, 301-02 (1836).

Since the dismissals in *Rosales VII* and *IX* were not on the merits, Appellants are allowed to file a second action, now that the jurisdictional defect in the first has been cured, and now that no other parties are required to be joined, since *Carcieri* holds that the government cannot have taken parcel 04 in trust for the tribe, since it was not under federal jurisdiction in 1934. *Univ. of Pittsburgh* at 1332.

Similarly, even the government's citation of *Innovad*, *supra*, held there was no issue preclusion, where the issue was not adjudicated on the merits in the purported first action. "No action before this court qualifies as fully resolved 'prior litigation.'...By its terms, the doctrine of issue preclusion is not available at this stage of the adjudicative process." 260 F.3d at 1334.

The government concedes that issue preclusion does not apply when "a change in the applicable legal context intervenes." AB45; *Bobby v. Bies*, 129 S. Ct. 2145, 2152 (2009); *Bingaman v. Dept. of Treasury*, 127 F.3d 1431 (Fed. Cir.

1997). Moreover, where no issue of fact was determined on the merits, and there "remain disputed issues of fact, if proven, that will make this case significantly different" from *Rosales VII* and *IX*, "the doctrine of collateral estoppel is inapplicable.""Collateral estoppel will not bar a suit where there has been a subsequent modification of significant facts or a change in the controlling legal principles." *Tulia Feedlot Inc. v. United States*, 231 Ct. Cl. 971, 1982 WL 11290, *2 (Ct. Cl. 1982); *Duncan v. United States*, 1982 WL 25171, *1-2 (Ct. Cl. 1981).

Here, there has been both a subsequent modification of significant facts, and a change in the controlling legal principles. *Carcieri* has intervened, and is most relevant, since it now holds that a tribe cannot claim beneficial ownership of trust land, if it was not under federal jurisdiction in 1934, regardless of whether it was subsequently recognized under IRA §16, 25 U.S.C. 476, and regardless of whether the land was taken into trust for "all other persons of one-half or more Indian blood" under IRA §19, 25 U.S.C. 479.

*Carcieri* not only changed the law, but the facts at the time the CFC improperly dismissed Appellants' claims, since the tribe was then barred from making a non-frivolous claim to any beneficial ownership of trust parcel 04. This subsequent change in the law and the facts, gives the Court jurisdiction that the *Rosales VII* and *IX* courts did not have, to finally make a decision on the merits of Appellants' beneficial ownership of parcel 04.

Again, the government misrepresents the holding in *Carcieri*, improperly suggesting it is "irrelevant." AB47. *Carcieri* certainly "speaks to" the fact that organized tribes cannot hold beneficial interests in trust land, if they were not under federal jurisdiction in 1934. Moreover, the government cannot deny that *Carcieri* changed the 75 year history of taking land into trust for many of the 104 tribes not under federal jurisdiction in 1934.*Carcieri* at 1065 and 1070, 1074-75.

Here, the government simply ignores the new facts and law, including the inability of the tribe to make a non-frivolous claim to beneficial ownership of parcel 04, and the different causes of action for real property damage, which were not plead in either *Rosales VII* (a trust patent action), or in *Rosales IX* (a personal injury action). Hence, Appellants are not re-litigating the very same set of facts plead in the prior actions.

However, even if they were, issue preclusion would not apply since the prior actions did not adjudicate any of the prior facts on the merits. As this Court held in *Innovad*, at 1334, "the doctrine of issue preclusion is not available at this stage of this adjudicative process," particularly since there "has been a change in the applicable law," and "a subsequent modification of significant facts." *Bingaman* at 1437; *Tulia Feedlot* at *1.

Therefore, the CFC erred, as a matter of law, in applying issue preclusion, and the dismissal of Appellants' claims must be reversed.

**4. The Appellants' Tribe is not a Required Party under R.C.F.C. Rule 19**

Contrary to AB46-7, *Carcieri* clearly articulates new law applicable to Rule 19, since a tribe, not under federal jurisdiction in 1934, can no longer make a non-frivolous claim to beneficial ownership of trust property, and therefore, as a matter of law, cannot be, either a required or necessary party, and certainly cannot be an indispensable party in this lawsuit.

The government, like the CFC, improperly "presupposes" that the tribe can make a non-frivolous claim that the government was allowed to take land into trust for a tribe that was not under federal jurisdiction in 1934. However, just as the UKB's interests were statutorily extinguished, preventing the Cherokees from becoming required or necessary parties in *United Keetoowah Band of Cherokee Indians of Okla. v. United States ("UKB")*, 480 F.3d 1318, 1326 (Fed. Cir. 2007), *Carcieri* extinguished the tribe's claim to beneficial ownership here, preventing it from being a required party, as a matter of law.

The government is just wrong to argue that Appellants seek to have the government interfere with the tribe's interests, since the tribe has no beneficial interest in parcel 04. Contrary to AB48, there are no conflicting non-frivolous claims, nor inconsistent obligations among the tribe, the Appellants and the

government.[12] The government owes no obligation to the tribe with regard to parcel 04. The tribe cannot lose an interest it has never lawfully had, nor lawfully exercised. There is no authority for a tribe to just start claiming an interest in property, that the Supreme Court holds it never acquired, thereby precluding the true beneficial owners of their property, and the right to have the merits of their ownership adjudicated.[13]

Without a direct beneficial ownership interest in parcel 04, the tribe is neither a required or necessary, nor an indispensable, party to Appellants' claims. *UKB*

at 1326-27, and the cases the government fails to acknowledge at AOB58-60.

The government concedes that tribal "claimed interests can be excluded if 'fabricated' or 'frivolous,'" and therefore the tribe is not a required party under Rule 19. AB51, citing *UKB*, at 1325, and *Shermoen v. United States*, 982 F.2d

[12] "Future conflicting claims," AB50, have not occurred, and are not ripe for decision. Nor could the tribe lawfully initiate a lawsuit against the government for infringing a non-existent interest *Carcieri* holds it never had, while Appellants' beneficial ownership claims will be finally determined on the merits, barring further litigation or inconsistent judgments.

[13] Unlike the facts here, the cases cited by the government at AB49-50, did not involve tribal claims, made frivolous by the Supreme Court's holding. In those cases, the tribes interest in the land was undisputedly within their jurisdiction.

1312, 1318 (9th Cir. 1992); *Davis v. United States*, 192 F.3d 951, 958-59 (10th Cir. 1999).

Since the tribe's ownership claim is frivolous, the tribal court had no jurisdiction over parcel 04, and its eviction is a nullity. *Tunica-Biloxi Indians of La. v. Pecot*, 351 F.Supp. 519, 525 (W.D. La. 2004), "Due to a lack of a set aside by the federal government, the hotel land was not Indian country...The tribal court, therefore, does not have subject matter jurisdiction over this action," and *Nevada v. Hicks*, 533 U.S. 353, 360 (2001).

Since the tribe has never had an ownership interest in parcel 04, per *Carcieri*, the tribe is neither a required or a necessary, nor an indispensable party to the action, and the CFC's Rule 19 dismissal must be reversed.

**5. Appellants have Properly Plead the Statutory Basis Mandating Money Damages and the Acts of Taking Attributable to the Government**

Since the facts plead in the amended complaints must be assumed to be true on a motion to dismiss, contrary to AB56-57, Appellants have properly plead and cited ample authority for both the statutory basis mandating monetary damages and the acts of taking attributable to the government, based upon the comprehensive nature of the federal statutes and regulations, pursuant to which the government has taken on, controlled, and supervised the Appellants' Indian trust property, human remains, and funerary objects, under 25 U.S.C. 465 et seq., 25 U.S.C. 3001

et seq., and 16 U.S.C. 470aa et seq. A380, A410-412, the Jurisdictional Statement in the AOB 1-3, and particularly *Coast*, and its progeny, cited at AOB55.[14]

## CONCLUSION

For the foregoing reasons, the CFC's October 7, 2009 order, and October 14, 2009 judgment of dismissal, should be reversed.

Respectfully submitted

By: 

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[14] See also, *Bobula v. USDOJ*, 970 F2d 854, 858 (Fed. Cir. 1992), equitable relief "incidental to and collateral to a claim for money damages," is available under 28 U.S.C. 1491.

**United States Court of Appeals**
**for the Federal Circuit**

No. 2010-5028

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WALTER ROSALES and KAREN TOGGERY,
*Plaintiffs-Appellants,*

*v.*

UNITED STATES,
*Defendant-Appellee*.

----------)

**DECLARATION OF AUTHORITY PURSUANT TO 28 U.S.C. § 1746 AND FEDERAL CIRCUIT RULE 47.3(d)**

I, John C. Kruesi, Jr., being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

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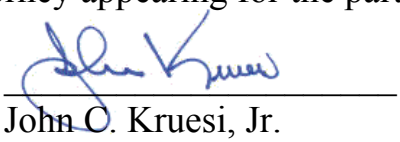
May 14, 2010



John C. Kruesi, Jr.

## CERTIFICATE OF SERVICE

**United States Court of Appeals**
**for the Federal Circuit**
No. 2010-5028
----------)
WALTER ROSALES and KAREN TOGGERY,
*Plaintiffs-Appellants,*
*v.*
UNITED STATES,
*Defendant-Appellee*.
----------)

I, John C. Kruesi, Jr., being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

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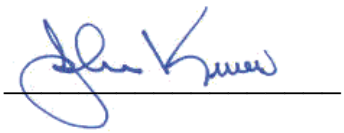

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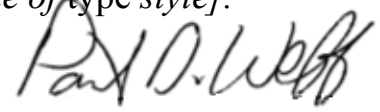

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